

FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

KONINKLIJKE KPN N.V.,

Plaintiff,

vs.

TELEFONAKTIEBOLAGET LM
ERICSSON and ERICSSON INC.,

Defendants.

Case No. 2:21-cv-113

JURY TRIAL DEMANDED

**KPN'S MOTION TO STRIKE PORTIONS OF
THE EXPERT REPORTS OF WICKER AND SALTERS**

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I. Introduction

KPN moves to strike certain opinions disclosed by Ericsson experts Dr. Stephen Wicker and Ambreen Salters as unreliable and misleading. In his infringement rebuttal report, Wicker offers [REDACTED]

[REDACTED] g. Salters, in turn, [REDACTED]

[REDACTED]. Additionally, Salters [REDACTED]

[REDACTED], [REDACTED]

[REDACTED]

[REDACTED]

II. Legal Standard

“The relevance prong [of *Daubert*] requires the proponent [of the expert testimony] to demonstrate that the expert's ‘reasoning or methodology can be properly applied to the facts in issue.’” *Johnson v. Arkema, Inc.*, 685 F.3d 452, 459 (5th Cir. 2012) (citation omitted). “The reliability prong mandates that expert opinion ‘be grounded in the methods and procedures of science and ... be more than unsupported speculation or subjective belief.’” *Id.*

III. Argument

A. Wicker’s opinions on [REDACTED] are unsupported and should be struck.

Wicker offers two categories of opinions that are unreliable and should be excluded.

First, Wicker purports to opine on how to [REDACTED]

[REDACTED]

[REDACTED] Ex. 1 ¶¶ 570-620. He addresses [REDACTED]

[REDACTED] E. Yet Wicker did

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not [REDACTED]

[REDACTED] (*id.* ¶ 582):

See also id. ¶¶ 595, 601, 615, 620 ([REDACTED]

[REDACTED]).

Wicker's [REDACTED]

[REDACTED] *Robroy Indus.-Tex., LLC v. Thomas & Betts Corp.*, No. 2:15-CV-512-WCB, 2017 WL 1319553, at *9 (E.D. Tex. Apr. 10, 2017) (noting that “denominating a witness as an expert does not give that witness leave to simply read materials such as exhibits and depositions in the case and then testify as to their contents”);¹ *Eidos Display, LLC v. Chi Mei Innolux Corp.*, No. 6:11-CV-00201-JRG, 2017 WL 1322550, at *6 (E.D. Tex. Apr. 6, 2017) (“approaches to apportionment” that rely on “arbitrary divisions based on the number of claims, process steps, or contact holes without any connection to the economic demand for the claimed technology” do not “pass muster under Rule 702”). Indeed, this Court has recently concluded as much:

However, assuming *arguendo* that each patent of the fifty Apple DRM patents were practiced in the FairPlay functionality at the time of infringement, ***Mr. Thomas cannot assume that each patent has equal value.*** The exercise of performing an apportionment analysis is to separate the specific value of the patents-in-suit using reliable known methods. It would be unscientific to make a conclusory assumption that each patent has equal value. Indeed, not all patents are created equal.

¹ The *Robroy* order ultimately struck portions of testimony from Salters (the same Ericsson expert discussed below) regarding causation.

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Personalized Media Communications, LLC v. Apple, Inc., No. 215CV01366JRGRSP, 2021 WL 662237, at *7 (E.D. Tex. Feb. 20, 2021) (emphasis added) (citations omitted).

Second, Wicker [REDACTED]

[REDACTED] . Ex. 1 ¶ 265. Nothing

in [REDACTED]

[REDACTED] . *See id.* ¶¶ 5-7. Further, [REDACTED]

In short, as demonstrated by his own report, Wicker [REDACTED] . It thus should be excluded. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 992 (5th Cir. 1997) (“Where an expert bases his opinion in part on his experience with similar machines, we cannot fault the court for demanding a more detailed recollection of the expert’s review and understanding of similar machines than was reported by [the expert].”).

The Court should exclude Wicker’s opinions in ¶¶ 265, 582, 595, 601, 615, and 620 of his report.

B. The Court should exclude Salters’ unsupported damages opinions.

[REDACTED] Ericsson damages expert Ambreen Salters offers [REDACTED]

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[REDACTED]

[REDACTED]

Salters fails to [REDACTED], [REDACTED]

[REDACTED]

[REDACTED]. As explained further below, the Court should exclude these opinions under *Daubert* and Rule 702.

1. Salters fails to [REDACTED]
[REDACTED]

To support her royalty rate of a [REDACTED] per year total for all the patents in suit, Salters relies heavily on [REDACTED]

[REDACTED]

Salters [REDACTED], rendering her opinion about them infirm.

In 2004, [REDACTED] Ex. 2 ¶ 45,

[REDACTED]

[REDACTED]. *Id.* [REDACTED]

[REDACTED]

[REDACTED]. *Id.* [REDACTED]

[REDACTED] s. *See id.*

[REDACTED]

[REDACTED]. *See* Ex. 2 ¶¶ 49-51. [REDACTED]

[REDACTED]

[REDACTED]. *See id.* ¶¶ 52-58.

. The Court should exclude them.

." Ex. 3 ¶ 18.

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Salters' failure to even attempt to account for this significant economic difference "warrant[ed] exclusion." *Id.*

The same result is required here. The [REDACTED]

[REDACTED]

[REDACTED]:

[REDACTED]

[REDACTED]. As discussed in *Biscotti*, licenses to standard essential patents reflect important economic differences that must be accounted for when using them to analyze a hypothetical negotiation over patents that have not been proven to be FRAND-encumbered. *Id.*

[REDACTED]

[REDACTED]

[REDACTED]. Compare Ex. 2 ¶ 50 [REDACTED]

[REDACTED], with Ex. 5

([REDACTED]) at 2 ([REDACTED]

TS 21.299) and Ex. 6 (KPN-ERICSSON_00045405) ([REDACTED]

[REDACTED]). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Salters ignores [REDACTED]

[REDACTED]

[REDACTED]. See

generally Ex. 2. This renders her reliance on [REDACTED] and offers fundamentally

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unreliable and speculative, warranting exclusion. *See Biscotti*, 2017 WL 2607882, at *4; *M2M Sols. LLC v. Motorola Sols., Inc.*, No. CV 12-33-RGA, 2016 WL 767900, at *8 (D. Del. Feb. 25, 2016) (“Mr. Donohoe has failed to show how these two large, worldwide, standard-essential, FRAND patent portfolios are economically comparable to a license that the parties would have negotiated for a single asserted patent.”).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See* Ex. 3 at 3.1; Ex. 7; Ex. 8 at KPN-Ericsson_00053172; Ex. 9 at KPN-Ericsson_00053183. [REDACTED]

[REDACTED]

to KPN. *See* Ex. 2 ¶¶ 50, 59. Her reason for doing so does not survive *Daubert* scrutiny.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED] Ex. 2 ¶ 59. As a result, her opinion is unreliable. *See Apple Inc. v. Wi-LAN Inc.*, 25 F.4th 960 (Fed. Cir 2022) (expert’s reliance on =agreements as comparable should be stricken where expert failed to reliably address the extent to which “other patents” licensed in the agreement “contributed to the royalty rate”).

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]” Ex. 2 ¶ 60.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* ¶ 61.

Salters’ approach is inconsistent with 35 U.S.C. § 284, which provides that “[u]pon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer...” In other words, patent damages are to compensate the patent owner. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 76 (Fed.Cir.2012) (the hypothetical negotiation “seeks to discern the value of the patented technologies to the parties in the marketplace” (emphasis added)). The court cannot award [REDACTED]; [REDACTED]

[REDACTED]

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This opinion should be stricken under bedrock patent law. For example, in *Albritton v. Acclarent, Inc.*, the defendant's expert's "cost-based apportionment analysis" was excluded as unreliable because the value of "the patented functionality" is derived from its "contribution to the larger operation of the device as a whole," and "[t]here is little, if any, connection between that function and the pure cost of the component." No. 3:16-CV-03340-M, 2020 WL 11627275, at *11 (N.D. Tex. Feb. 28, 2020); see *MLC Intellectual Property, LLC v. Micron Technology, Inc.*, 10 F.4th 1358 (Fed. Cir. 2021) (affirming exclusion of damages opinion that "goes well beyond what the [purportedly comparable] clause implies and is incompatible with the [] agreement as a whole"); *Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1346 (Fed. Cir. 2013) ("[A]n infringer's net profit margin is not the ceiling by which a reasonable royalty is capped."); *SIMO Holdings Inc. v. Hong Kong uCloudlink Network Tech. Ltd.*, 396 F. Supp. 3d 323, 344 (S.D.N.Y. 2019), *modified in part*, No. 18-CV-5427 (JSR), 2019 WL 7816487 (S.D.N.Y. Dec. 11, 2019), *clarified on denial of reconsideration*, No. 18-CV-5427 (JSR), 2020 WL 498200 (S.D.N.Y. Jan. 22, 2020) (exclusion of defendant's damages opinion warranted where expert improperly "started from net profits").

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] .” Ex. 2 ¶ 63. [REDACTED]

[REDACTED]

[REDACTED], Ex. 2 ¶ 37, it is hard to understand Wicker’s opinion. [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED].” Ex. 2 ¶ 63. As explained above, [REDACTED]

[REDACTED]. *See supra* pp. 2-3. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. *See* Ex. 2 ¶¶ 45, 52, 54, 56

[REDACTED]

[REDACTED]); *see also* Ex. 3 at 2 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], Ex.

³ In fact, in direct contravention of hornbook patent law, [REDACTED]
[REDACTED]. *See infra* pp. 13-14.

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2 ¶ 61, [REDACTED], *id.* ¶ 62, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]” *id.* ¶ 63. [REDACTED]
[REDACTED]. *See TASER Int'l, Inc. v. Karbon Arms, LLC*, No. CV
11-426-RGA, 2013 WL 6773663, at *1 (D. Del. Dec. 19, 2013) (“Mr. Gallagher offers almost no
basis as to how he arrived at his royalty rate other than that he considered the above numbers and
factors. This is the quintessential *ipse dixit* justification. Mr. Gallagher's reasonable royalty
analysis is not based on any reliable methodology, and therefore fails *Daubert* and is excluded
under Fed. R. Evid. 702.”).

As explained above, Salters’ [REDACTED]
[REDACTED]
[REDACTED]. The Court should exclude at least Salters’ opinions expressed in
paragraphs 59 through 63, 91, and 120 of her report.

2. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. *See* Ex. 10 (Nokia Agreement) ¶ 1.01 (granting Nokia a
[REDACTED]); Ex. 11 (Huawei Agreement) ¶ 2.1
(same); Ex. 12 (ZTE Agreement) ¶ 2.1 (same); *see also supra* pp. 6-7 ([REDACTED])

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[REDACTED]

[REDACTED]).

Second,

[REDACTED]

[REDACTED]

[REDACTED]. Ex. 2 ¶¶ 69, 78, 82. [REDACTED]

[REDACTED]

Third,

[REDACTED]

[REDACTED]

[REDACTED]. Ex. 2 ¶ 68. [REDACTED]

[REDACTED]

[REDACTED], *see supra* pp. 8-9, [REDACTED]

[REDACTED]

[REDACTED]. *See* Ex. 2 ¶ 68, p. 73 (StoneTurn Workpaper 6).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].” *See id.* ¶ 79 & n. 170. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* ¶ 83.

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Fourth, and finally, [REDACTED]

[REDACTED]
[REDACTED] See, e.g., Ex. 10 at 3; Ex. 11 at 2. This alone is reason to exclude her opinions. See *supra* pp. 9-10.

The Court should exclude Salters' opinions expressed in ¶¶ 68, 69, 78, 79, 82, 83, 85, 86, 91, and 120 of her report.

3. Salters' [REDACTED]

As an alternative model, [REDACTED]

[REDACTED] . Ex. 2 ¶ 111. [REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED] . *Id.* ¶ 112. [REDACTED]

[REDACTED] see, e.g., Ex. 13 at Claim 1, [REDACTED]

[REDACTED] *Bayer HealthCare LLC*

v. Baxalta Inc., No. 16-CV-1122-RGA, 2019 WL 330149, at *3 (D. Del. Jan. 25, 2019).

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[REDACTED] See Ex. 2

¶¶ 27, 29, 32, 113; *see also id.* at p. 67 (StoneTurn Exhibit 2). [REDACTED]

[REDACTED] see Ex. 13 [REDACTED]

[REDACTED] See
ThinkOptics, Inc. v. Nintendo of America, Inc., 2014 WL 2859578, NO. 6:11–CV–455, (E.D. Tex. June 21, 2014) (“Since the royalty base in Professor Slottje’s report excludes the value of claimed elements, it does not ‘carefully tie proof of damages to the claimed invention’s footprint in the market place.’” (quoting *LaserDynamics*, 694 F.3d at 67)).

[REDACTED] Ex. 2 ¶¶ 113-14. This violates well-established law. *See supra* pp. 8-9 (discussing cases).

Finally, [REDACTED]

[REDACTED]. Ex. 2 ¶ 115. On this basis, [REDACTED]

[REDACTED], *see* Ex. 14 ¶¶ 2.1-2.4— [REDACTED]

[REDACTED] Salters does not
try to explain this, and [REDACTED] should be stricken.

The Court should exclude Salters’ opinions expressed in ¶¶ 27, 29, 32, as well as 112 through 115, of her report.

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4. Salters' attempt to [REDACTED]
[REDACTED]

In the guise of rebutting KPN Damages expert Michael Wagner, Salters offers a fourth and final damages model. It is unreliable for the same reasons as her affirmative opinions, and should also be excluded.⁴

[REDACTED]
[REDACTED]. *See supra* pp. 9-10. [REDACTED]
[REDACTED]
[REDACTED]. Ex. 2 ¶ 136.

[REDACTED]
[REDACTED].” *Id.* ¶ 136 & n. 259; p. 70 (StoneTurn Exhibit 3). [REDACTED]
[REDACTED]
[REDACTED] *See id.*

¶¶ 127-33.

Salters' model based [REDACTED] should be excluded. The Court should strike her opinions in ¶ 136.

* * *

For the reasons stated above, KPN respectfully requests the Court exclude Wicker's opinions expressed in ¶¶ 265, 582, 595, 601, 615, and 620 of his report, and Salters' opinions expressed in ¶¶ 27, 29, 32, 59-63, 68, 69, 78, 79, 82, 83, 85, 86, 91, 112-15, 120, and 136 of her report.

⁴ Salters may, of course, testify about her disclosed criticisms of Wagner to the jury. But she may not use those criticisms to attempt to support an unfounded and unreliable revision of Wagner's model.

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Respectfully submitted,

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CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

I hereby certify that the foregoing document is being filed under seal pursuant to the Protective Order entered in this matter.

/s/ Adam Tisdall
Adam Tisdall

CERTIFICATE OF CONFERENCE

I hereby certify that the parties have conferred on May 16, 2022, about this motion and that counsel for Defendants are opposed to this motion.

/s/ Adam Tisdall
Adam Tisdall

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel of record on May 16, 2022.

/s/ Adam Tisdall
Adam Tisdall